No. 2903

In the United States Circuit Court of Appeals

For the Ninth Circuit

JOHN GILL, for whom has been substituted Maurice McMicken, Administrator with the will annexed of John Gill, Deceased,

Plaintiff in Error,

vs.

FRANK WATERHOUSE,

Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF DEFENDANT IN ERROR

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This was an action at law brought by the plaintiff in error John Gill, of Edinburgh, Scotland, against Frank Waterhouse, of Seattle, Washington.

The complaint alleges in substance that Frank Waterhouse, Limited, a British corporation having its head office in London, was indebted to The Commercial Bank of Scotland, Limited, also a British corporation having a branch office in London. That on the 16th day of February, 1889, at London, the said Frank Waterhouse, Limited, and the said Frank Waterhouse were desirous of obtainig from said bank certain further advances to Frank Waterhouse, Limited. That the bank thereupon agreed to make such further advances upon being guaranteed by the said defendant Frank Waterhouse the payment by the said Frank Waterhouse, Limited, of advances theretofore made by the bank and advances to be thereafter made, and that in consideration thereof, the defendant executed a certain Letter of Guarantee, guaranteeing payment to the bank, which is set out in the pleadings. That between March 18, 1898, and October 31, 1903, the said bank, at the special instance and request of said Frank Waterhouse, Limited, and of the defendant, advanced to said Frank Waterhouse, Limited, sums aggregating £103217-11-11, upon which there remained due the bank on September 15, 1907, $109,-909.54. That the bank from time to time and up to October 31, 1906, at the special instance and request of Frank Waterhouse, Limited, and of this defendant, granted to Frank Waterhouse, Limited, and to the defendant, time and indulgence upon said indebtedness; and upon October 31, 1906, said bank made a demand

upon this defendant for immediate payment of the amount due on account of advances so made to Frank Waterhouse, Limited. That prior to the commencement of this action, the said bank, for a good consideration, assigned to plaintiff "said letter of guarantee hereinbefore set forth, together with its demand against said defendant," and that the plaintiff is now the owner and holder thereof. The defendant by proper pleading admitted executing the Letter of Guarantee referred to, but denied all the other material allegations of the complaint and put the plaintiff upon full proof. The defendant also pleaded by affirmative defenses that any amount owing from Frank Waterhouse, Limited, to said bank had been paid to said bank prior to said alleged assignment of the letter of guarantee; that the cause of action stated in the complaint is barred by the statute of limitations of the State of Washington; that the principal debtor, Frank Waterhouse, Limited, had been, prior to the commencement of this action, discharged and released from any liability for any indebtedness to the bank.

Upon the conclusion of the testimony on behalf of plaintiff, the defendant moved for an instructed verdict, or that the case be taken from the jury on the ground that the testimony adduced on behalf of the plaintiff was not sufficient to warrant a verdict in his favor. This motion was sustained by the Court and judgment entered accordingly.

The defendant in error contends that the action of the Court was proper, for the following reasons:

(1) The letter of guarantee shown in the record is in the nature of an offer to guarantee payment of the debt of Frank Waterhouse, Limited, to the bank theretofore incurred and advances thereafter made; and the plaintiff offered no evidence tending to show that the bank within a reasonable time thereafter gave notice to the defendant that the guarantee was accepted or that the further advances would be made.

(2) The testimony shows that the indebtedness of Frank Waterhouse, Limited, to the bank was paid in full on February 15, 1907, by the plaintiff, John Gill, and there is no evidence tending to show any agreement that the payment by Gill was intended at the time it was made as a purchase of the indebtedness rather than a payment. The assignment, therefore, by the bank of the letter of guarantee of the defendant, which assignment was made in October, 1907,—eight months after the debt had been paid,—was ineffective and vested plaintiff with no right of action against this defendant. The amended complaint does not allege that the indebtedness of Frank Waterhouse, Limited, to the bank was ever assigned by the bank to the plaintiff and the assignment offered in evidence is not an assignment of the debt of the principal debtor, but an assignment of the letter of guarantee only.

(3) The indebtedness of Frank Waterhouse, Limited, to the bank, as alleged and attempted to be proven, was upon open account.

More than three years elapsed between the date of the last item of said account and the commencement of this action, and the account was, therefore, at the time of the commencement of this action barred under the laws of the State of Washington as against the principal debtor, Frank Waterhouse, Limited. The principal debt being barred and the principal debtor thereby released from his obligation to pay, the right of action of the creditor against a guarantor is also barred under the laws of the State of Washington.

(4) The plaintiff failed to prove any indebtedness of Frank Waterhouse, Limited, to The Commercial Bank of Scotland, Limited.

These questions arose during trial mainly upon objections to testimony offered by the plaintiff.

I

It is conceded by the plaintiff in error that there is no evidence in the record tending to show that the bank ever notified Waterhouse that it had accepted his letter of guarantee, or that it meant to give credit to Frank Waterhouse, Limited, on the basis thereof, or that he ever had knowledge that such credit was given subsequent to the execution of the letter of guarantee,

until October 31, 1906, more than seven years thereafter, when the bank suddenly made demand upon him for the payment of the indebtedness.

The letter of guarantee was addressed as follows:

"To THE COMMERCIAL BANK OF SCOTLAND, LIMITED,

I, Frank Waterhouse, Tacoma, Washington, United States, America, hereby guarantee you payment of all sums for which Frank Waterhouse, Limited, etc."

The letter of guarantee closes:

"IN WITNESS WHEREOF, These presents are subscribed by me at London on the sixteenth day of February eighteen hundred ninety-nine before these witnesses: Andrew Whitlie, Manager, and William Bamford Lang, Accountant, both of your branch there.

(Signed) FRANK WATERHOUSE.

(Signed) AND. WHITLIE,
Witness,

(Signed) W. B. LANG,
Witness."

The letter contains no recital of any consideration moving between any of the parties, nor of any relationship of defendant to the principal debtor. So far as appears from the face of the instrument, it is a voluntary offer by Waterhouse to guarantee the payment of the past and future debts of Frank Waterhouse, Limited, to the extent and upon the conditions mentioned in the letter. The offer did not cover all indebtedness that had been or might be thereafter incurred with the bank by the principal debtor, but was limited

to £21,000 in amount and to "an account or accounts kept in their name in your books and operated on for them by cheques or drafts signed by two of their directors and their secretary, all for the time, or on bills, promissory notes or other obligations." The indebtedness claimed in this action was upon accounts, and the offer of guarantee therefore was limited to such accounts as were operated on by checks or drafts signed by two of the directors and the secretary of Frank Waterhouse, Limited. There is no evidence whatever in the record bearing upon this guarantee or the action of the bank with reference thereto, except the admission in the answer of defendant that he executed such an instrument in February, 1899, and the testimony showing that the bank, in October, 1907, undertook to assign the letter to the plaintiff.

While there is some conflict in the state decisions, the rule is thoroughly settled by the United States Supreme Court that a letter of guarantee addressed to a particular person, particularly when it contemplates future credit, does not become a contract and binding upon the guarantor until accepted by the party giving credit and notice thereof given to the guarantor within a reasonable time thereafter.

Russell vs. Day, 7 Cranch 69.
Edmondson vs. Drake, 5 Peters 624.
Douglass vs. Reynolds, 7 Peters 113.
Lee vs. Dick, 10 Peters 482.

Adams vs. Jones, 12 Peters 207.
Louisville Mfg. Co. vs. Welch, 10 How. 461.
Davis vs. Wells, 104 U. S. 159.
Sewing Machine Co. vs. Richards, 115 U. S. 524.

In *Adams vs. Jones,* supra, the rule is stated as follows:

> "And the question which, under this view, is presented, is whether, upon a letter of guaranty, addressed to a particular person or to persons generally, for a future credit to be given to the party in whose favor the guaranty is drawn, notice is necessary to be given to the guarantor that the person giving the credit has accepted or acted upon the guaranty and given the credit on the faith of it. We are all of the opinion that it is necessary; and this is not now an open question in this Court, after the decisions which have been made in *Russell vs. Clarke,* etc. It is in itself a reasonable rule, enabling the guarantor to know the nature and extent of his liability; to exercise due vigilance in guarding himself against losses which might otherwise be unknown to him; and to avail himself of the appropriate means in law and equity to compel the other parties to discharge him from further responsibility."

In the case of *Louisville Mfg. Co. vs. Welch, supra,* the Court said:

> "The rule requiring this notice within a reasonable time after the acceptance is absolute and imperative in this Court, according to all the cases; *it is deemed essential to an inception of the contract;*"

Again, in the case of *Davis vs. Wells, supra,* the Court said of this rule:

> "In some instances it has been treated as a rule, inhering in the very nature and definition of every contract, which requires the assent of a party to whom a proposal is made to be signified to the party making it, in order to constitute a binding promise; in others it has been considered as a rule springing from the peculiar nature of the contract of guaranty, which requires, after the formation of the obligation of the guarantor, and as one of its incidents, that notice should be given of the intention of the guarantee to act under it, as a condition of the promise of the guarantor.
>
> The former is the sense in which the rule is to be understood as having been applied in the decisions of this Court."

This is also the rule prevailing in the large majority of the states.

12 Ruling Case Law, pp. 1068-1069.

The letter of guarantee in the case at bar was addressed to the bank and was signed by the defendant in the presence of the Manager and Accountant of the bank. This fact constitutes all of the evidence there is in the record showing or tending to show that there was ever any agreement or assent upon the part of the bank to the guarantee, or that it ever in any way bound itself to make any future advances thereon. No notice of acceptance by the bank or of any advances made thereon was ever given to the defendant. The plaintiff alleges in his amended complaint that:

> "the said Frank Waterhouse, Limited, and the said Frank Waterhouse were desirous of obtaining from the said The Commercial Bank of Scot-

land, Limited, certain further advances to be made to the said Frank Waterhouse, Limited; and thereupon said The Commercial Bank of Scotland, Limited, agreed to make such further advances to the said Frank Waterhouse, Limited, upon being guaranteed by the said defendant the payment by the said Frank Waterhouse, Limited, of advances theretofore made to the said Frank Waterhouse, Limited, and thereafter to be made to the said Frank Waterhouse, Limited, up to a sum not to exceed twenty-one thousand pounds sterling (£21,000); and thereupon and in consideration thereof the said Frank Waterhouse did then and there make, execute and deliver to the said The Commercial Bank of Scotland, Limited, his certain Letter of Guarantee."

It will thus be seen that the issue tendered by the complaint was an agreement upon the part of the bank to make further advances to Frank Waterhouse, Limited, if defendant would guarantee payment of both past and future advances, and the acceptance of those terms by the defendant and the execution of the letter of guarantee in consummation thereof. The plaintiff wholly failed to prove the agreement alleged in the complaint. The only fact appearing in the record is the fact that the defendant did execute a letter of guarantee in the form set out in the complaint; but there was an utter failure of proof of any agreement on the part of the bank to make further advances if the letter of guarantee was executed. The letter of guarantee on its face is unilateral. It is clearly nothing more than a tender of a guarantee which would not become a con-

tract unless accepted by the bank and notice of acceptance given to the defendant. It is one which is continuous in its nature and contemplates future credit to be extended to the principal debtor. In such cases the reasons given by the Supreme Court why notice of acceptance should be given to the guarantor are particularly applicable. While there is some conflict in the state decisions upon the general rule of necessity of giving notice of acceptance, it seems to be universally held, even in the State Courts, that notice of acceptance and of the extension of further credit must be given seasonably by the creditor to the guarantor before he is bound upon a letter of guarantee continuous in its nature, and covering future credits to the principal debtor.

12 Ruling Case Law, p. 1069, sec. 19, and cases cited (n. 16).

Plaintiff in error contends in his brief that the rule above mentioned does not apply to an absolute guarantee of payment. That contention, manifestly, is inconsistent with the decisions of the Supreme Court above cited. The guarantee involved in the case of *Lee vs. Dick* was an absolute guarantee, and the rule that notice of acceptance must be seasonably given was affirmed in that case.

Also, in *Louisville Mfg. Co. vs. Welch,* 10 How., the guarantee was an absolute guarantee of payment,

and the Court held that this notice of acceptance by the party guaranteed was essential to the inception of the contract.

The guarantee in *Davis vs. Wells,* 104 U. S., was also an absolute guarantee of payment. The Court held that notice of acceptance in that case was not necessary because the guarantee on its face recited the receipt of a consideration to the guarantor from the party guaranteed, and held that that fact showed a consummated contract. The guaranty in *Sew. Mch. Co. vs. Richards,* 115 U. S. 524, was absolute and the rule requiring notice of acceptance was applied.

Of course, if the creditor offers to extend the credit on condition that the guarantee is given, and the guarantee is thereupon given, it constitutes a completed contract because it is the acceptance by the guarantor of an offer made by the party guaranteed and constitutes a meeting of their minds.

In the case at bar, however, there is absolutely no proof whatever that the bank ever offered to extend future credit if the guarantee was given, nor is there anything in the record showing any consideration passing between the creditor and the guarantor to induce the execution of the letter of guarantee. So far as the record shows, the defendant signed this letter of guarantee addressed to the bank, without any previous negotiations with the bank, or any agree-

ment upon its part to make any advances, and was not seasonably notified by the bank that it accepted the guarantee or would make or had made additional advances in reliance thereon. The fair interpretation of the offer of defendant contained in the letter of guarantee is that he will guarantee payment of past indebtedness of, and of future advances to, Frank Waterhouse, Limited, if the bank will make such future advances. The bank never at any time signified to the guarantor its acceptance of or assent to this offer.

The plaintiff in error, however, further contends that the defendant at the time of the execution of the letter of guarantee was a stockholder and director of Frank Waterhouse, Limited, and therefore interested in the securing of credit for that company, and that, therefore, no notice of acceptance of his offer was necessary. Citing *Doud vs. Bank,* 54 Fed. 846. In that case the guarantee recited on its face that the Sheffield Bank (the principal debtor) desired to establish credit with the National Park Bank whereby it might obtain advances, loans or discounts from said bank, and "therefore, the undersigned, being five in number and stockholders and directors of the bank first above named, to-wit, * * * in consideration of one dollar to each of them in hand paid, the receipt whereof is hereby acknowledged, and the said loans,

discounts or other advances to be made, do hereby jointly and severally guarantee, etc." The guarantee showed on its face that the Sheffield Bank had requested these advances from the Park Bank and in view thereof these stockholders and officers of the bank, in consideration of the one dollar paid them and of the loans and discounts to be made, guaranteed payment of such loans and discounts.

The Court manifestly construed the recitals of the written instrument as showing a consideration moving between the guarantor and the guarantee. It is based upon the ruling in *Davis vs. Wells, supra,* where the Court held that the recital in the guaranty of even a nominal consideration passing between the guarantor and the guarantee was sufficient to show a consummated contract.

The same rule was applied in the Ruffler case, 239 U. S. 17, where the Court held that putting the guarantee in the form of a sealed instrument such as a bond, imported a consideration paid by the obligee to the obligor, and therefore evidenced a completed contract. As stated above, there is nothing in the letter of guarantee in the case at bar evidencing any consideration passing between the guarantor and the guarantee, nor any interest of the guarantor in the debtor corporation. One of the witnesses, Mr. McEwen, does state that Frank Waterhouse, Limited,

was incorporated in December, 1897, and that the defendant was one of the original shareholders. There is no testimony, however, that the defendant was a shareholder in 1899, when the guarantee purports to have been executed, unless a presumption arises that he continued to be such.

In the Doud case the directors who signed the guarantee were in charge and control of the debtor company and necessarily knew of the advances made by the creditor to the debtor at the time that they were made. In the case at bar the debtor company was located in London, as was the creditor bank, while the defendant was a resident of the State of Washington, and presumably without knowledge of any advances made by the bank to the debtor company.

The argument of plaintiff in error fails to distinguish between two distinct elements of a contract, that is, the mutual assent of the parties as one element, and consideration sufficient to uphold the contract when made as another element. If, in fact, the defendant at the time he executed the letter of guarantee was a stockholder in Frank Waterhouse, Limited, that interest might be sufficient consideration to give binding force to the contract of guaranty when completed; but it has no tendency whatever to prove that the bank accepted or assented to the guarantee and agreed to make the further advances. Where the

letter of guarantee recites a consideration passing from the party guaranteed to the guarantor, this recital is, as held in the case of *Davis vs. Wells, supra,* evidence of the assent of the party guaranteed and of the consummation of the contract. On the other hand, even though the letter of guarantee recites that it is executed for a valuable consideration, that recital is no evidence of the assent on the part of the party guaranteed unless it further shows that the consideration moved from the party guaranteed to the guarantor. This was illustrated in the case of *Davis Sewing Mch. Co. vs. Richards, supra.* In that case the guarantee read:

> "For value received, we hereby guarantee to the Davis Sewing Machine Co. of Water town, New York, the full performance of the foregoing contract on the part of John W. Poler, and the payment by said John W. Poler of all indebtedness, etc."

The Court held that this was an offer of guarantee and that before recovery could be had thereon it must be proven that the party guaranteed gave seasonable notice of acceptance of the guarantee. The Court used this language:

> "There is no evidence of any request from the plaintiff corporation to the guarantors or of any consideration moving from it and received or acknowledged by them at the time of their signing the guarantee. The general words at the beginning of the guarantee "Value received" without stating from whom, are quite as consistent with

a consideration received by the guarantors from the principal debtor only."

This language can be well applied to the record in this case. There is no evidence of any request from the bank to the defendant to give a guarantee, or of any consideration moving from the bank and received or acknowledged by the defendant at the time he signed the guarantee. Any interest the guarantor may have had as stockholder in the principal debtor would have no tendency whatever to show an assent of the bank to accept the guarantee and make advances under it.

II

Among the grounds which moved the District Court to grant a non-suit was this—the District Judge was convinced that the debt of Frank Waterhouse, Limited, to the bank was extinguished by the payment of the amount thereof made by John Gill on February 15th, 1907, and that such was the intent of the parties to the transaction. A consideration of all of the facts relating to the transaction will show how entirely correct the conclusion was.

On February 16th, 1899, defendant in error, Alexander McNab, John M. Mitchell, John Marshall, John McNab, Bruce Archibald, O. J. Trinder and Charles Richardson held all of the stock of Frank Waterhouse, Limited, hereinafter referred to as the English company (Record page 37). On that day the English

company was indebted to the bank on the general account of £1,025:11:11 (Record page 98), upon the loan account, £15,000, and upon the No. 2 account, £5,000. On that date the defendant in error executed the guaranty which is sued upon in this action (Record page 4). At the same time the other shareholders, except Trinder and Richardson, executed to the bank like guaranties (Record pages 32 and 45). On October 6th, 1900, the English company had a credit balance at the bank on the general account of about £400 (Record page 101). The loan account and the No. 2 account stood unchanged. On that day the defendant in error entered into the agreement with the English company which is set out at page 126 of the Record, under the terms of which the defendant in error agreed to incorporate an American company, and the American company to purchase from the English company all the assets of the company for $230,000, $50,000 cash, balance in ten equal semi-annual payments, the deferred payments to be evidenced by bonds secured by mortgage, the American company to assume all the American indebtedness of the English company, but none of the English indebtedness, except the account of Trinder, Anderson & Co. Waterhouse surrendered all further interest in the English company. The English company was to forthwith cease doing business and appropriate the said purchase price to pay the English indebtedness. Thereupon the English com-

pany ceased active business (Record page 38). Alexander McNab was informed of and a party to the transaction (Record page 39). The only officials of the bank whose depositions were taken by the plaintiff in error were unwilling to admit, but did not deny, that the bank was cognizant of this agreement (Record pages 33, 47 and 77). The secretary of the English company testified that nothing was withheld from the bank (Record page 39). After that agreement was made numerous advances were made by the bank to the English company on the general account, aggregating £16,109:15:10 (Record pages 101-104), and on the No. 2 account £221:0:12 (Record page 106), and in these two accounts after that date the English company deposited in the bank more than enough money to pay the amounts due on the general account at the time the agreement was entered into (Record pages 101-104 and 106), and nearly half enough to pay the debit balance on that date on account No. 2. After that date no demand was made by the bank upon the defendant in error until October 31st, 1906 (Record page 90). On February 15th, 1907, John Gill, who was Alexander McNab's solicitor (Record page 28), paid the bank the amounts then owing to it by the English company, and each of the three accounts was closed upon the books of the bank by entries under that date of that payment as follows: "By cash, paid by Mr. John Gill" (Record pages

104, 105 and 107). The several witnesses testified that on that date the said John Gill paid the bank the amount of the indebtedness owing to it by the English company (Record pages 23, 30, 43 and 48). John Gill never received from the bank any assignment or other document in evidence of or relating to the transaction until on October 8th, 1907 (eight months later), the bank gave him the assignment of the letter of guaranty of the defendant in error and of the bank's claim against the defendant in error (Record page 91). Gill never did receive any assignment of the bank's claim against the English company (Record page 26), in respect of which fact the allegation of the amended complaint is significant (Record page 7, paragraph 10). There is no suggestion in the Record that the principal debtor, the English company, participated in any way in or had even knowledge of the transaction at the time it occurred (Record page 48). The assignment of the claim against defendant in error to Gill was negotiated and effected by the head office of the bank in Edinburgh (Record page 48). The bank never did execute to Gill any assignment of any of the other guaranties (Record pages 25, 32 and 33), but the other guaranties were delivered over by the bank to said Gill (Record pages 25, 32 and 33). No attempt was ever made to enforce any of these other guaranties, though one of the executors of the will of said Gill (Record page 24) volun-

teered the statement that the executors reserve "any right competent to them in the event of their not recovering the whole of the debt under this suit to obtain from the Commercial Bank of Scotland, Ltd., an assignation or assignations to the guarantees granted by the said Alexander McNab and others and recover from them." (Record page 28.)

Gill is said to have made this payment to the bank at the request of his friend Alexander McNab. That the transaction was a payment, as the District Court viewed it—not a purchase, as claimed by the plaintiff in error—is demonstrated by the fact that afterwards McNab made a payment to Gill on account of the transaction, £397 on account of principal and £778 on account of interest (Record pages 27 and 28).

That the defendant in error contended that the indebtedness of the English company to the bank had been paid, was well known to the plaintiff in error long before the depositions were taken in England and Scotland, for it was so alleged in the answer (Record page 12). Nevertheless, plaintiff in error examined none of the officers of the bank who personally had the transaction with Gill. The witnesses whom the plaintiff in error did examine, though having no personal knowledge of the matter, yet undertook to testify in an evasive way in regard to it from hearsay or

guess, and it is that sort of testimony to which plaintiff in error refers in his brief.

On these facts the District Judge said in ruling upon the motion for a non-suit (Record page 51):

> "And upon the other question of payment, I am convinced in my own mind, taking the conduct of the parties as disclosed by the evidence, that the payment when it was made in February was payment. I in my own mind believe that the assignment was an after-thought. The relation of Mr. McNab, who appears to be one of the guarantors to the extent of £21,000, the same amount for which Mr. Waterhouse became a guarantor and I think perhaps in the same accounts, the three different accounts, the testimony of Mr. Anderson discloses that this was paid by Mr. Gill, and I think the testimony likewise discloses either on the part of Mr. Gill or the testimony of Mr. Anderson that this was paid upon the suggestion of Mr. McNab. Now, Mr. McNab was the attorney—Mr. McNab was a client of Mr. Gill. Mr. McEwen in his testimony on cross-examination identifies a contract between the defendant Waterhouse Company, Incorporated, of which Mr. McNab was one of the stockholders, in which this indebtedness was to be taken care of, and when we take all of these things into consideration, the motive that would prompt Mr. McNab, the testimony of the witnesses who testify with relation to the payment and the circumstances surrounding the payment as made, the disclosure of the witnesses' ignorance of the things which actually did take place, and the testimony simply directed to the things which affirmatively appear on the Record, and then the absence of the testimony on the part of the bank from persons who know as to what was actually done and the intention of the parties, and then the assignation as it

is called which was executed in October following, eight months after the payment was made as recorded in the books of the bank, and the testimony of Anderson, who seems to be advised and states that the bank afterwards granted the assignation, when we take all thees things into consideration, I am in my own mind convinced that the payment, when it was made by Gill, was made on behalf of these other parties upon whom the obligation rested, and it was not at that time with any intention of granting an assignment, and this is further confirmed by the testimony that no assignment was made and taken from the bank of McNab and of these other parties. The only assignment that was made was simply the assignment of Waterhouse."

The order of dismissal is as follows:

"and the Court, after due consideration, being of the opinion that the evidence submitted to the jury is not sufficient to justify a verdict in favor of plaintiff and against the defendant herein, etc." (Record page 19.)

In so ruling the District Judge conformed to the established practice of the Federal Courts. We understand it to be the established law that it is the duty of the Court, at the close of the evidence, to direct a verdict for the party who is clearly entitled to recover, where the evidence is such that it would be its duty to set aside a verdict in favor of his opponent if one were rendered.

Motey vs. Pickle Marble & Granite Co. (C. C. A, 8th Cir.), 74 Fed. 155.
People's Bank vs. Aetna Ins. Co. (C. C. A., 4th Cir.), 74 Fed. 508.

And this ruling applies equally where the motion is for a non-suit at the close of the plaintiff's case.

Coughran vs. Bigelow, 164 U. S. 301.
Slocum vs. Insurance Company, 228 U. S. 364.
Oscanyan vs. Arms Co., 103 U. S. 261.

In *Patton vs. Railway Company,* 179 U. S. 658, the Court, in confirming the ruling above stated, said:

> "Hence it is that seldom an Appellate Court reverses the action of a Trial Court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the Judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noticing all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect an Appellate Court will pay large respect to his judgment."

And in *Sloss Company vs. Railway Company* (C. C. A., 4th Cir.), 85 Fed. 133, the Court said (page 138):

> "If the Court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the Court should say so to the jury. *Pleasants vs. Fant,* 22 Wall. 122; *People's Bank vs. Aetna Ins Co.,* 20 C. C. A. 630, 74 Fed. 507. This is

> a well-established rule in the Federal Court. It is essentially different from the rule in the courts of many of the states, but is uniform in the courts of the United States; and it has been decided by this Court that section 914, Rev. St., does not require the Federal Courts to change this rule of procedure so as to conform to the practice existing in the courts of the states. The action of the Circuit Judge, who presided at the trial of this case, in ordering that the defendant have judgment of non-suit, was in conformity with the decisions of the Supreme Court of the United States and the decisions of this Court."

This Court has announced the same rule in *Shoup vs. Marks* (C. C. A., 9th Cir.), 128 Fed. 32, saying, at page 37:

> "The Trial Court may direct a verdict in any case where the evidence is of such conclusive character that the Court, in the exercise of sound, judicial discretion, would be compelled to set aside a verdict in opposition to it."

The only testimony upon which the plaintiff in error relies to establish that the payment by Gill was not a payment to extinguish the debt of the English company was that of witnesses who were not present at or parties to the transaction and who have and could have no knowledge of their own on the subject, and whose testimony is either a guess on their part or the rankest kind of hearsay. Plaintiff in error claims that hearsay evidence was rendered competent because of the form of the stipulation under which the depositions were taken. To this we do not agree,

but nevertheless we regard that circumstance as immaterial, for the reason that under the rule which obtains in the Federal Courts, above set forth, the District Court would not have been satisfied to have allowed a verdict to stand against the defendant in error, the only support of which verdict was hearsay evidence on so material a point.

The case presented upon the facts is a perfect case of voluntary payment by a stranger of a debt due, upon which debt the defendant sued stood in the relation of a surety only. The case comes within the principle of law laid down in *Inhabitants of South Scituate vs. Inhabitants of Hanover,* 9 Gray 420, in which the Court announced the rule in these words:

> "It was a voluntary payment by the plaintiffs of a debt due from the defendants. Such payment gives no cause of action. It falls within the well settled rule of law, that the payment of the debt of another raises no assumpsit against the person whose debt is paid, and no action will lie by reason of such payment, unless a request, either express or implied, to make the payment is proved. The law does not permit the liability of a party for a debt to one person to be shifted so as to make him debtor to another without his consent."

The language of the Supreme Court of New Mexico in *Lee vs. Field,* 54 Pac. 873, upon the point is:

> "The bank therefore was a stranger, a mere volunteer, when it paid the note; and unless there was some agreement, express or implied, to pur-

chase the note, the payment operated to extinguish it."

This rule is expressly recognized in the brief of the plaintiff in error.

If it is sought to characterize Gill as not a volunteer, on the theory that he acted at the request of McNab, the answer is, that he was nevertheless, as to the defendant in error and as to the principal debtor, a volunteer, but if it were otherwise and Gill is to stand in the shoes of McNab, it is to be remembered that McNab could not sue the defendant in error upon the guaranty, but only for contribution, which would be a different cause of action than that herein involved.

The Montana case of *Penwell vs. Flickinger,* 129 Pac. 324, is in point. The defendants had agreed to sell the Beaverhead Ranch Company a certain automobile at the price of $956.50, and the Ranch Company paid them the price in full. They never delivered the automobile, nor returned the price. The plaintiff had recommended that the Ranch Company make the purchase, and feeling morally responsible, the plaintiff paid to the Ranch Company the said amount on August 6th, 1910. Plaintiff then sued the defendants to recover the amount of money which he had so paid the Ranch Company. After the suit was brought, and in January, 1911, the plaintiff procured from the Ranch Company an assignment of its demand against the de-

fendant. The Court held that the action could not be maintained for the reason that the payment made had extinguished the obligation and it could not be revived by the subsequent assignment. The Court said:

> "He (plaintiff) was under no legal obligation to make good the default of the appellants (defendants), and that he did so without their authorization, are facts patent upon the face of the record. Equally certain it is that there was no subsequent ratification or promise to repay, and there is not a suggestion in the record of any oral assignment of its claim from the company to the respondent (plaintiff) when he made the payment, or of any understanding that it should be assigned or kept on foot for his benefit. Under such circumstances the general rule is that the payment extinguishes the debt, at least so far as the creditor is concerned."

The court held that the assignment had no force or effect because the original payment had extinguished the obligation, and it could not be revived by the assignment.

The case of *Moran vs. Daniel Abbey et al and Phillip Heffner,* 63 Cal. 56, is directly in point. Abbey had given Hancock his promissory note, on which note Heffner was a surety. Hancock placed the note in the bank for collection. After maturity of the note, at the request of Abbey, Moran paid the bank the amount of the note, going to the bank with Abbey for that purpose, and the bank delivered the note to Moran. Moran put the note in his safe, kept it there for three years,

then went to Hancock, and got Hancock to endorse it without recourse. He then sued Abbey and Heffner upon the note. It is true that Moran and Hancock were as to that transaction strangers to each other, a fact which only served to establish beyond all possibility of contradiction that there was no sale intended, but the rule would not have been different had payment been made direct to Hancock and he had delivered over the note. In reference to the subsequent transfer by endorsement, the Court said:

> "But payment of a promissory note is not a contract; it is performance of the obligation arising out of the promise to pay. Any one of the several parties to a joint contract, or anyone in his behalf and at his request, or with his consent, may perform the obligation; and when performance has been offered or made, and the money accepted, the obligation becomes extinguished. The parties to the contract are no longer bound to each other by the *vinculum legis* of right and duty. The duty being discharged the right ceases to exist; and the contract itself, though preserved in form, is no longer the subject of sale or transfer. When therefore the plaintiff, at the request of Abbey and for his benefit, took up the note, the contract was discharged, and the qualified indorsement of it by the payee, three years afterwards, was ineffectual as a transfer. The verdict of the jury was therefore according to the evidence and the law."

The judgment in favor of the defendant Heffner was affirmed.

It is to be remembered that in that case, as in the case at bar, the man who made the payment knew that

the person he was attempting to enforce the obligation against was surety only. The rule for which we are contending is much stronger when the debt which is paid, is after payment sought to be enforced against the surety.

Counsel for plaintiff in error deny the applicability of the Moran-Abbey case, on the ground that the payee of the note and the person paying it off did not personally meet in the transaction, but that criticism does not apply to the Montana case, for in that case those parties did meet personally in the transaction. At the same time, counsel for plaintiff in error criticise the Montana case because it appeared in that case that one of the debtors objected to the payment being made. The circumstance in no way influenced the decision of the Montana Court, for the Court in its opinion gives importance only to the fact that the debtors did not give *their consent*.

The case of *Day vs. Humphrey,* 79 Ill. 452, is not subject to any of the criticisms made by counsel for the plaintiff in error herein. In that case one Humphrey and one Hinckley gave their note to the cashier of the First National Bank of Galesburg, Hinckley being surety only thereon. Humphrey applied to Day (as did McNab to Gill) for the money to take up the note. Day and Humphrey went to the bank and Day gave the bank his check for the face of the note, and

Humphrey paid the interest, and the cashier surrendered the note to them. Prior to the meeting at the bank nothing had been said between Day and Humphrey as to what security, if any, Humphrey was to give Day. At the bank Humphrey proposed to give Day his note, but Day said the old note was good enough. After the cashier had passed the note over the counter to them, Day suggested that the bank endorse the note without recourse, which it did. Thereafter Day sued Humphrey and Hinckley on the note. The Court in affirming the judgment of the lower Court in favor of Humphrey said:

> "While the evidence is slightly conflicting, we think it greatly preponderates in favor of the proposition that the legal effect of what the parties did was the payment of the note to the bank. There is no pretense the bank ever sold the note to plaintiff. The idea of indorsing the note was suggested after it had been passed over the counter to the parties, as having been paid. It was returned to the bank, after some consultation between them, to be indorsed to plaintiff.
>
> The note may have been good, as against Humphrey, in the hands of plaintiff, but as to Hinckley it is different. He was not present, and consented to no arrangement about the matter. As to how the note was paid, Humphrey states, in his testimony, the note was not indorsed in his presence, but the cashier of the bank thinks it was. Conceding the note was indorsed exactly as the cashier says it was, the arrangement could not bind Hinckley, who was a mere security, and was not present, consenting to it. The $200 paid to the bank to take up the note, was, in fact, a loan by plaintiff to Humphrey, to be repaid on the first

> of the ensuing April. The conduct of the parties is inconsistent with any other theory of the case. The note was taken up on the 10th of December, 1870, but it was never presented to Hinckley for payment until 1874, and in the meantime Humphrey had become insolvent. The contest in the case is between the security for Humphrey and his creditor, and the facts proven raise no equities in favor of the latter as against the former."

The similarity of the Illinois case to the case at bar is remarkable in several further aspects, to-wit, the surety was not present at the time of the payment, nor consented to any arrangement about the matter. The money paid to take up the note was in fact a loan to one of the parties to the note. In this case the party was a co-surety (co-guarantor), and that the money was a loan to him is proven by the fact that he subsequently repaid a part of it. In the Illinois case the payment was made in 1870. No demand was ever made to the surety until four years later, and in the meantime the principal debtor had become insolvent. In the case at bar the action against the surety (guarantor) was brought about one year after the payment, and the principal debtor had in the meantime become insolvent. The assignment in both cases was made after the payment had been made—in the Illinois case, a few minutes; in the case at bar, eight months after. The case at bar is stronger than the Illinois case in the circumstance that here the principal debtor was not present at and did not participate in or know of the transaction.

Another circumstance which makes the case at bar much stronger for the defendant in error than any of the cases cited is the fact that the assignment when made did not purport to be an assignment of the debt of the principal debtor—Frank Waterhouse, Ltd., and the bank has never assigned the debt of the principal debtor to anyone. To illustrate the force of this point, let us suppose that in the Illinois case the note had been delivered up, as it was, and later the bank had executed and delivered to Day an assignment of its one-time cause of action on the note against the surety, but had not even attempted to assign its cause of action against the principal debtor. Would there be any hesitation in deciding that as to the surety the debt for which he was surety had been paid and extinguished?

In this connection, it is of importance to consider what right of contribution, if any, the defendant in error would have if judgment in this case should go against him and he should pay the same. In such event, if he were to sue his co-guarantor Mitchell, for example, Mitchell could successfully defend on the fact that a stranger had paid the debt for which he was guarantor, without attempting to keep the debt alive as against the principal debtor and without attempting to keep his guaranty alive. Therefore, in Mitchell's case payment by Gill would necessarily be held to have extinguished the debt and his liability as guarantor.

III

There was another ground presented to the Court in support of the motion for a non-suit, to which the Court made no reference in the opinion rendered upon the motion. That ground is, that upon the facts proven, the action was barred by the statutes of limitations of Washington. Those statutes, so far as they are pertinent to this case, are (Remington's Codes and Statutes of Washington):

> (Section 157) Within six years—
>
> 2. An action upon a contract in writing, or liability express or implied arising out of a written agreement.
>
> (Section 159) Within three years—
>
> 3. An action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument.
>
> (Section 166)—
>
> In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item provided in the account on either side.

Both of these statute were set up as affirmative defenses in the answer.

THE ACCOUNT IN QUESTION IS NOT A MUTUAL, OPEN AND CURRENT ACCOUNT

Held by the Supreme Court of South Dakota in *McArthur vs. McCoy*, 112 N. W. 155, under a statute identical with the Washington Section 166:

> "Where the items of account are all on one side, as between a shopkeeper and his customer, and where goods are charged and payments credited, there is no mutuality, and the statute bars the account. * * * To constitute mutual accounts, there must be mutual demands. Each party must have a demand or right of action against the other."

In *Bank vs. Butnett* (Cal.), 58 Pac. 85, the account was that of a bank against a customer. The Court said:

> "The account shows no transactions except receipts and disbursements of money by the bank. * * * We can discover no elements of a mutual, open, and current account in the transaction."

And in the California case of *Flynn vs. Seale,* 84 Pac. 263, the Court said:

> "A mutual account implies a reciprocity of dealing between the parties to the account, and is made up of matters of set-off wherein each party has a right of action against the other."

See also *In re Hiscock's Estate* (Mich.), 44 N. W. 947.

CREDIT ENTRIES ON THE BANK'S BOOKS OF PAYMENTS ARE NOT EVIDENCE OF PARTIAL PAYMENTS FOR THE PURPOSE OF SUSPENDING THE STATUTE OF LIMITATIONS

In *Schlotfeldt vs. Bull,* 18 Wash. 64, it was held:

First, that endorsements of partial payments entered upon the back of a promissory note are not evidence of the fact of payment in the absence of other competent evidence of the payments or of assent of the defendant to the endorsements, and

Second, that the same rule applies to entries of payments made in books kept by the holder of the note.

The Court's reasoning is that the endorsements were merely self-serving, and not against the pecuniary interest of the party making them, and "To allow the books to be introduced under the circumstances of this case would but permit a person to make evidence for himself." This holding is expressly affirmed in *Arthur & Co. vs. Burke,* 83 Wash. 690, at page 694.

PARTIAL PAYMENTS BY PRINCIPAL DEBTOR DO NOT SUSPEND THE STATUTE OF LIMITATIONS AS TO THE SURETY OR GUARANTOR

This is squarely held in *Stubblefield vs. McAuliff,* 20 Wash. 442, where the Court says:

> "It is clear that, under the section of our statute (now Rem. §176) requiring a new promise to be in writing in order to revive or continue the obligation, one of two co-debtors could not make such promise for the other without express authority, whether the acknowledgment or promise was made before or after the statutory bar had attached; and it is equally apparent, upon principle, that the same rule controls in payments upon an existing obligation."

This decision was accompanied by a full review of the authorities, one of them being *Bell vs Morrison,* 1 Peters 351.

In *Bassett vs. Thrall,* 21 Wash. 231, the doctrine of the Stubblefield case is explicitly extended to the case of payments made by a principal debtor, and there held not to suspend the statute as against the surety.

In *Perkins vs. Jennings,* 27 Wash. 145, the Court at page 153 announces that the doctrine of the Stubblefield case "must now be considered the settled rule of this Court."

Later holdings of the Washington court to the same effect are *Arthur & Company vs. Burke,* 83

Wash. 690, and *Northern Commercial Company vs. Trading Co.,* 86 Wash. 589 at 593. In the first of these the Court says:

> "It is also the settled law of this state, following the trend of authority in others, that in order to toll the statute of limitations, the partial payment must have been a voluntary payment made or authorized or ratified by the party against whom the payment is invoked as tolling the statute."

By the express terms of the guaranty involved in this case, the money was payable by the guarantor upon demand. Therefore, the money was payable forthwith, and the statute of limitations would begin to run immediately upon execution of the document as to the previous advances, and from the date each subsequent advance as to such advance. *Brooks vs. Trustee Company,* 76 Wash. 589; *Douglass vs. Reynolds,* 7 Peters 113.

It has been the contention of the plaintiff in error that this case is ruled by the six year statute. While this is an erroneous contention, nevertheless, under the principles above announced, the six year statute would bar all the items in the account except those incurred within the six year period prior to the commencement of this action (which was in January, 1908). This would bar all the items in the loan account and all of the general account except £1993:13:6, and all of the No. 2 account except £221:0:12, without taking into

consideration payments made on the general and No. 2 accounts during the six year period, which as to the general account would aggregate in amount more than the advances made during the same period.

Certain it is that the three year statute applies to the principal debt and the principal debtor. The principal debt was an open account and clearly comes within the language of Section 159 of the statute. The last entry in either of the three accounts is the item in account No. 2 of an advancement on October 30th, 1903 (Record page 106). So that at the time this action was commenced in January, 1908, four years and two months at least had elapsed. The result is that the action against the principal debtor was barred by the statute of limitations of the state of Washington, and the presumption being (at this stage of the case conclusive) that the law of England is the same as the law of the state of Washington. The cause of action against the principal was also barred in England.

We then have this proposition: The cause of action against the principal debtor being barred at the time of the commencement of this action, the cause of action against the guarantor is barred.

Upon this proposition there is a conflict of decision among the several states of the Union, but in so much as the affirmative of the proposition is the settled law of the state of Washington, therefore, it is the

settled law in this Court for this case. The question first came before the Supreme Court of the state of Washington in the case of *Spokane County vs. Prescott,* 19 Wash. 418. The action was against the defaulting county treasurer of Spokane County and the sureties upon his official bond. The three year limitation was applicable to the principal debtor, but it was contended that, there being a cause of action against the principal debtor and the sureties upon the bond—a written instrument—the six-year statute was applicable. The Court held that the three-year statute was applicable as to the principal debtor, and held that the bar as to the principal debtor was a bar in favor of the sureties. The Court said at page 421:

> "Manifestly, in conformity to well-recognized legal principles, no action can be maintained against the sureties unless the liability of the principal exists at the time of the commencement of the action. * * * The undertaking of the sureties was collateral security for the performance of the duties of their principal." (Citing among other cases *State vs. Blake,* 2 Ohio St. 147).

The Court says further:

> "If the bond be merely collateral security for the performance of the principal contract, and is not itself the original contract, then the question here in controversy is illustrated by reference to the rules controlling principal and suretyship. In states where a mortgage conveys the fee to the mortgagee, an action upon the mortgage is not barred, though the debt may be; but whereas in this state the mortgage creates a lien only, and is an incident to, and collateral security for, the debt, when the principal (the debt) is barred,

no action can be maintained upon the mortgage itself (the collateral security for the debt").

The case of *Dickman vs. Stroback,* 26 Wash 558, approves the Prescott case, applying its ruling to an action against the sureties upon a guardian's bond.

Johnson Service Co. vs. Aetna Indemnity Co., 46 Wash. 434, approves the Prescott case, applying its ruling in favor of the surety upon a bond given by a contractor for the construction of a school house.

The Prescott case was followed by Judge Rudkin in *Newberry vs. Wilkinson,* 190 Fed. 62, he saying at page 68:

> "The Supreme Court of the State of Washington has held that the undertaking of the surety is collateral security for the performance of the duties of the principal, and that no action can be maintained against the surety unless the liability of the principal exists at the time of the commencement of the action (citing the Prescott case). There is no doubt a conflict of authority on this question, but: 'No laws of the several states have been more steadfastly or more often recognized by this Court, from the beginning, as rules of decision in the courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the Legislature of a state, and as construed by its highest Court.'" (Citing *Bauserman vs. Blunt,* 147 U S. 647).

Judge Rudkin's decision in the Newberry case was affirmed by this Court in 199 Fed. 673, the Court saying at page 683:

> "This statute of non-claim, unless suspended or barred because of equitable considerations—a matter to be considered later—is effective to extinguish the liability of the principal, and, that being extinguished, there can exist none against the surety." (Citing the Prescott case).

Since the judgment was entered in the case at bar, the Prescott case has again come before the Supreme Court of Washington. In the case of *Lindblom vs. Johnston,* 158 Pac. 972 (not yet officially reported), the Court said of the Prescott case (page 974):

> "The case of *Spokane County vs. Prescott,* 19 Wash. 418, 53 Pac. 661, 67 Am. St. Rep. 733, relied upon by the appellant, is not contrary to the principle here announced. That was an action by the county to recover against the sureties on a treasurer's bond for a defalcation of the treasurer after the statute had barred an action against him individually for the liability. It was sought to hold the sureties on the theory that their promise to answer for the defalcation was in writing, and that liability thereon existed for six years, which time had not then expired. The judgment was rested on the ground that there could be no recovery against the sureties unless liability existed against the principal at the time of the commencement of the action; this on the principle that their undertaking was collateral to his, and their liability ceased when his ceased. In the course of the opinion it was said that the right of action against the treasurer was not controlled by the bond, but existed independent of it, and hence the statute of limitations governing the right of action in such a case was in no way affected by the bond."

In the case of *United States vs. Axman,* 152 Fed. 816, Judge Morrow sustained the doctrine for which

we are here contending, feeling himself obligated to do so because the Supreme Court of California had so ruled. He refers to Washington as one of the states holding the same doctrine (page 821). The action was against the sureties upon the bond of a contractor with the government.

We quote the following from the case of *State vs. Blake,* 2 Ohio St. 147, cited by our Court in the Prescott case:

> "At the same time it can not be denied that such a bond is only a collateral security for the faithful performance of the official duties of the officer (*Walton vs. The United States,* 9 Wheat. 651), and that the defendants are only liable as his sureties: and as such entitled to all the rights arising from that relation, and growing out of the contract into which they have entered.
>
> "From the first part of this proposition, it necessarily follows that the collateral obligation can exist no longer than the liability it was created to secure, while, upon the last, the universally acknowledged doctrine is, that 'it is of the essence of the contract of suretyship, that there be a subsisting valid obligation of a principal debtor. Without a principal there can be no accessory, and by the extinction of the liability of the former, the latter becomes extinct.' *Russell vs. Failor,* 1 Ohio St. 329; *Burge on Sur.* 3; *Theo. on Prin. and Sur.* 2.
>
> "Whatever, therefore, amounts to a good defense to the original liability of the principal, is a good defense for the sureties when sued upon the collateral undertaking. *Couch vs. Waring,* 9 Conn. 261.
>
> "Otherwise, the principal would be indirectly deprived of the benefit of a valid defense against

> the creditor, by being compelled, in effect, to respond through his sureties; or the sureties would be deprived of their right to reimbursement from the principal, and thus one or the other would be compelled to lose the rights which the law had secured to them."

The reasoning in support of the rule is well stated in the concurring opinion of Judge Ellis in *Mulvane vs. Sedgley* (Kan.), 64 Pac. 1038, at 1041.

The Auchampaugh case (Ia.) 27 N W. 805, quoted by Judge Ellis in the Kansas case, has this peculiarity. The action was barred as to the principal, but not as to the surety because of the change of residence of the surety from one state to another pending the statutory period, so that, unless the surety could avail himself of his principal's rights under the statute of limitations, he could not avail himself of the statute at all.

So it is entirely clear that the non-suit was properly granted because of the defense of the statutes of limitations, interposed in the answer.

In the brief of the plaintiff in error an assignment of error is made, though the matter is not discussed in the brief, upon the ruling of the Court excluding from evidence the Act of Parliament. This ruling of the Court was correct for the reason that the Act was one establishing a rule of evidence, and therefore could have no extra-territorial effect.

Scudder vs. Bank, 91 U. S. 406.
Clark vs. Eltinge, 38 Wash. 376.
Jones vs. Chicago, (Minn.) 83 N. W. 447.

IV

PROOF OF DEBT

In order to prove the alleged indebtedness of Frank Waterhouse, Limited, to the bank, the plaintiff in error offered in evidence two accounts purporting to be taken from the books of the bank, one copy being the account attached to the Gill assignment (Exhibit D, Transcript), and the other being the account referred to by the witness McEwen, as attached to the deposition of one Coutts (Exhibit E, Transcript), this latter deposition never having been offered in evidence. The offer of the first account is shown on page 31 of Transcript, and of the second account on page 40. The defendant objected to these accounts "because not proper evidence, and incompetent, irrelevant and immaterial, no proof books correctly kept or that the entries were contemporaneous with the transactions, or of the person making them that they were correctly made, or that such person had any knowledge of the transactions, or that the books were the books of the bank or current books kept in the ordinary current business of the bank, and upon the further ground that the witness had no personal knowledge of the transactions, and therefore his testimony is hearsay." (Tr. p 40).

The Court reserved its ruling on these objections until the plaintiff completed his case, and then sustained the objections and excluded the accounts. These rulings are covered by Assignments of Error Numbers III and VIII.

These advances by Frank Waterhouse, Limited, are claimed to have been made upon the checks of Frank Waterhouse, Limited, signed by two of the directors and the secretary of that company. The checks drawn upon the larger account, called the "Loan Account," are said to be still in the possession of the bank. (Tr. p 44). The checks alleged to have been drawn upon the "General Account" and "Number 2 Account" are said to be in the possession of the witness McEwen. None of these checks were produced at the trial or before the Commissioner taking the depositions, nor were the books of accounts themselves produced either at the trial or before the Commissioner. Instead thereof, these two accounts were produced before the Commissioner and offered in evidence at the trial.

Neither the witness Gill nor the witness Anderson claimed to have any knowledge whatever of the correctness of these accounts. The witness McEwen became secretary of Frank Waterhouse, Limited, in August, 1898. The account referred to by him is "Exhibit E" in the record. The principal account,

known as the "Loan Account," was opened March 18, 1898, and the balance due thereon in August amounted to £13,350. During September and October of that year additional advances of £1,650 were made upon the "Loan Account," making a total of £15,000. On the account called "Number 2 Account," the first advance was made June 20, 1898, of £5,000, and the principal other advance made upon that account was on August 12, 1898—£400. The third account, found on page 113 of the Transcript, was opened May 6, 1901, by a credit of £700, the principal of which was repaid March 1, 1902, leaving a debit balance of interest on that account of £11. McEwen specifically states that prior to August, 1898, he had no relations with Frank Waterhouse, Limited. With respect to the account, "Exhibit E," the witness testified:

> "I have examined the copy of the accounts of Frank Waterhouse, Ltd., with the Commercial Bank of Scotland, Ltd., appended to the deposition of George Sutherland Coutts, taken on the 17th December, 1913, and I am satisfied that said accounts correctly set forth the amount advanced to said Frank Waterhouse, Ltd. The amounts due by Frank Waterhouse, Ltd., to the Bank at 31st October, 1903, were as follows: (1) On the current or general account £1151.17.9. (2) On the loan account £15,000, and (3) on No. 2 account £3,479.13.3 These amount in all, with interest to February 15, 1907, to £22,-897.16.5" (Tr. p 35).

This answer of the witness was objected to by the defendant on the ground that it was hearsay, was

not the best evidence of the transactions, was not the proper way to prove book entries, neither the books nor said account therein having been proved. This objection was sustained by the Court, and this ruling is the fifth Assignment of Error.

The witness further testified that he is the liquidator of Frank Waterhouse, Limited, and that he had in his possession the checks drawn on the current or general account and Number 2 account, but could not part with them; that he had compared them with the copy of the accounts referred to and they agreed with the figures stated in that account. As stated above, the current or general account as shown on page 113 of the Transcript consisted only of a credit under date of March 6, 1901, of £700, and a debit under date of March 1, 1902, of £700, and some charges of interest which would not be represented by any check. It appears, therefore, that there were no checks drawn upon this account. The debit item under date of March 1, 1902, as shown on the account is as follows: "To C/A £700." We do not know what the "C/A" signifies. Apparently, it is not a check.

The advances made on the No. 2 Account (p. 109 Tr.) were made in the main prior to the time the witness became connected with Frank Waterhouse, Ltd. The other account, being the one attached to the assignment to Gill, is Exhibit "D" of the Tran-

script. With respect to this account, witness Lang testified that he was accountant in the London office of the bank from 1894 to 1911. He does not explain what his duties as accountant were. He had a general recollection that Frank Waterhouse, Limited, did some business with the bank. The books of the bank were not before him at the time he gave his testimony. He stated, however, that the copy of the account attached to the Gill assignment "had been excerpted from the books of the bank" and had been docqueted by him as correct. (Tr. pp. 41-42). He further testified that the accounts on the books of the bank were kept by ledger clerks employed in the London office from time to time, upon the regular books of the bank, and that the entries were made in the regular course of business of the bank, and that the copy of the account attached to the Gill assignment was a full copy taken from the bank's books. The witness testified wholly from the copy of the account before him. It should be noted that the stipulation and the commission issued to take the testimony of this witness contemplated that his testimony would be taken before Commissioner W. H. Quarrell in London, where the books of the bank showing these transactions would be accessible. The deposition, however, was not taken before Quarrell, but before one Alex. Guild, at Edinburgh, Scotland, who had been commissioned to take the testimony of James Lawson Ander-

son only. This witness was asked in Cross-Interrogatory No. 2 (Tr. p. 74) whether statements made by him in answer to direct interrogatories relative to these accounts were "based upon personal knowledge of such advances, or merely upon entries you find in the books of the bank," to which the witness answered (Tr. p 45) rather evasively:

> "I recollect that Frank Waterhouse, Limited, transacted business with the Commercial Bank of Scotland, Limited, and obtained cash advances from the bank. My recollection has been refreshed by an examination of the accounts appended to said assignation by the Commercial Bank of Scotland, Limited, in behalf of said John Gill."

The foregoing contains a full statement of all the testimony offered by the plaintiff to prove the indebtedness of Frank Waterhouse, Limited, to the Commercial Bank of Scotland, Limited. It is manifest that the evidence was not sufficient to even *prima facie* prove that indebtedness. Books of account are admissible under certain conditions as proof of the transactions entered on the books, provided the books are books of original entry and the entries are proven to have been made in the ordinary course of business and at the time of the transactions recorded, and are shown by the person who made them to have been correct entries and that the person making them had knowledge of the transactions shown by the entries.

It is recognized, however, that such testimony at best is unsatisfactory and is admitted only upon the ground of necessity, there being no other feasible way ordinarily of proving the various items in an open account. It is usual also to produce the books at the trial or before the Commissioner taking the deposition, so that they may be examined by the opposite party and the integrity of the entries as they appear upon the face of the books may be tested. It has been held in many cases that a copy of the account is inadmissible without the production of the books, in some instances even when the books were shown to have been burned.

Creamer vs. Shannon, 17 Ga. 65.
Peck vs. Paschen, 52 Ia. 46.
Pettit vs. Teal, 57 Ga. 145.
Halstead vs. Cuppy, 67 Ia. 600,
Creswell vs. Slack, 68 Ia. 110.
Moody vs. Roberts, 41 Miss. 74.
Clark vs. Bullock, 2 N. Y. Sup. 408.

In *Prince vs. Smith,* 4 Mass. 455, the Court rejected the account when offered without the production of the books, but indicated that if the books had been shown to have been burned and other proper preliminary proof had been tendered, the account might have been admissible. And in *Holmes vs. Marden,* 12 Pick. 169, the same rule is announced. In *Reddington vs. Gilman,* 1 Bosw. 235, and in Abbott's Trial Evidence, p. 325, it is stated that copies of an account are secondary evidence and loss of the books

must be shown before the account is admissible under any circumstances. The general rule of evidence is that the best evidence of which the case is susceptible must be produced if it is fseasible to do so.

In this case, the original books of entry of the bank are in existence in the possession of the bank in London and were accessible and could have been reached by a Commissioner so that they could have been produced before the Commissioner, and the defendant given an opportunity to test the integrity of the entries by an inspection of the books and the entries themselves. These advances by the bank are alleged to have all been made upon checks drawn by Frank Waterhouse, Limited. Those checks are all in existence, some being in the possession of the witness McEwen, but the larger part being in possession of the bank. These checks should have been produced at the trial, or if there was any sufficient reason why the bank should not part with them, they should have been produced for inspection before a Commissioner and correct and accurate copies certified by him returned with his commission. The defendant was not a party to these transactions between Frank Waterhouse, Limited, and the bank. They took place in London and all of the books and accounts were kept in London. The defendant was resident in the State of Washington during all that time and had no per-

sonal knowledge of what was taking place between the London company and the bank. Under those circumstances, the plaintiff, standing in the shoes of the bank and seeking to collect the indebtedness of Frank Waterhouse, Limited, from this defendant, should be held to the strictest rules of evidence in proving the indebtedness.

Even if it was admissible to use the copy of the account without the production of the books or the checks, either at the trial or before the Commissioner, it is obvious that there must be supplemental proof, not merely that the account is a correct copy from the books, but that it is a correct copy of the items of account appearing upon the books of original entry of the bank, and in addition, the plaintiff must supply such other evidence as would have been necessary if he had produced the books themselves. The common law rule as to the admissibility of books of account in evidence, which, of course, prevails in Federal Courts, is stated in *Lewis vs. England,* 2 L. R. A. (N. S.) 405, as follows:

> "The rule is that to authorize the introduction of books of account as evidence of the facts entered, it must be shown (a) that they have been fairly and honestly kept; (b) that they are the books of a party engaged in the business to which they refer; (c) that the entries were made, (1) in the usual course of business, (2) at or about the time the facts entered transpired; (b) that the entries are original and (e) made by a party hav-

> ing knowledge of the facts entered, or that information thereof was communicated to the party by whom the entries were made by some person engaged in the business whose duty it was to transact the particular business and make report thereof for entry on the books, and (f) such report and entry must be made at the time of the occurrence or before the facts can be supposed to have passed from his recollection."

Books of account are not evidence *per se* and are admissible only when the entries in them are shown to be correct by the persons who made them and who had knowledge of the facts at the time the entries were made.

> *Ins. Co. vs. Weide,* 9 Wall. 677.
> *Bates vs. Preble,* 151 U. S. 149.

Probably the clearest statement of the rule prevailing in the Federal Courts is found in *Chaffee vs. U. S.*, 18 Wall. 516, at page 541. Referring to the rule governing the admissibility of entries in books of account the Court says:

> "That rule, with some exceptions not included in the present case, requires for the admissibility of the entries not merely that they shall be contemporeaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts and be corroborated by their testimony, if living and accessible, or by proof of their handwriting, if dead or insane, or beyond the reach of the process or commission of the Court. The testimony of living witnesses personally cognizant of the facts of which they speak, given under the sanction of an oath in open court where they may

be subjected to cross-examination, affords the greatest security for truth. Their declarations, verbal or written, must, however, sometimes be admitted when they themselves cannot be called, in order to prevent a failure of justice. Admissibility of the declarations is in such cases limited by the necessity upon which it is found."

Further authorities to the same effect are:

Chicago Lbr. Co. vs. Hewitt, 64 Fed. 314.
Phillips vs. U S., 201 Fed 259.
Chandler vs. Pomeroy, 87 Fed. 262.
Little Rock Co. vs. Dallas Co., 66 Fed. 522.

Tested by these rules, there was a manifest failure to provide the supporting or supplemental testimony required to make the books admissible as evidence of the truth of the entries thereon.

The witness Lang testified that "the accounts were kept by the ledger clerks employed in the London office from time to time. They were kept upon the regular books of The Commercial Bank of Scotland, Limited, and the entries in said account were made in the regular course of business of said bank." (Tr. p 42).

Assuming that the witness is speaking from personal knowledge, all that he testifies to is that the entries in the books were made contemporaneously with the facts to which they relate. There is an untter failure to comply with the rule as laid down in the Chaffee case, to-wit: That proof must be furnished that the entries were made "by parties having personal knowledge of the facts and be corroborated by their testi-

mony, if living and accessible, or by proof of their handwriting, if dead or insane or beyond the reach of the process or commission of the Court."

Before these book entries are admissible in evidence, the ledger clerks referred to should have been produced as witnesses to prove that the entries made by them were correct entries and that they were cognizant of the transactions to which the entries relate.

The only other testimony relied upon by the plaintiff in error to prove the indebtedness of Frank Waterhouse, Limited, to the bank consists of some loose and evidently hearsay statements by the witnesses McEwen and Lang. McEwen, referring to the account "Exhibit E," stated:

> "I am satisfied that said accounts correctly set forth the amount advanced to said Frank Waterhouse, Limited." (Tr. p. 35).

And again on page 36, he says:

> "The said accounts correctly show the manner and amounts in which said accounts of Frank Waterhouse, Limited, were operated upon by cheques. The amounts shown by said accounts to have been paid out for the benefit of Frank Waterhouse, Limited, were actually so paid."

The witness Lang stated that "the correctness of the accounts was never disputed by Frank Waterhouse, Limited, or by anyone else." (Tr. p. 45). Both of these statements were excluded by the Court.

It is evident from a reading of the deposition of this witness that he is not speaking from personal knoweldge of the actual transactions between the English corporation and the bank. McEwen was not connected with the corporation until after practically all of the principal loans or advances were made. He has never seen the bank books, so far as his testimony indicates, nor the checks on the principal account which are still in possession of the bank. The form of expression used by him, "I am satisfied," clearly indicates that he is intending to express an opinion rather than to claim any personal knowledge of the various items making up the account.

The witness Lang does not profess to have had any personal knowledge of the transactions whatever.

In *Phillips vs. U. S.,* 201 Fed. 259, the books of the Hanover National Bank were admitted in evidence over the objection of the defendant, in a prosecution for making a false entry in a report to the Comptroller of the Currency of the condition of the First National Bank of Vinita, of which he was an officer. Mr. Wheeler was called as a witness for the prosecution and testified that he was associated with the Hanover National Bank at the time of the transaction referred to and was familiar with its books of account; that he was city manager and had general supervision of the books of the bank and of the clerical force, whose duty

it was to keep the books; that his knowledge as to the books and means of identification came from his duties with the bank, and he testified specifically that the books were correctly kept and that they correctly stated the amount which they purported to state. Upon this testimony, the trial court admitted the books of the Hanover Bank as evidence. The Circuit Court of Appeals reversed the case, for the reason that taking the testimony of the witness Wheeler as a whole, it was apparent that he had no personal knowledge of the correctness of the items in the book, and that his positive statement that the books were correct meant no more than that he believed them to be correct.

The same comment is applicable to the testimony of McEwen, in so far as he states that he is satisfied the accounts are correct. The account is offered as a whole and certainly as to that part of the account originating prior to August, 1898—which comprised at least four-fifths of the entire indebtedness—he could by no possibility have had any personal knowledge, and does not claim to have had any.

A general statement by a witness that the account is correct when upon his own testimony it is apparent that he has no personal knowledge of the transactions, is not sufficient to warrant the admission of the account in evidence.

Chandler v. Robinett, 131 Pac. 891.
Prince vs. Smith, 4 Mass. 455.
Walker vs. Trotter Bros., 68 So. 345.

There is still another reason why these accounts were not admissible in evidence. Book accounts in order to be admissible must be sufficiently definite and specific to show in and of themselves the nature of the charges, so that no other evidence is necessary to show what the article charged is.

17 *Cyc.* 375.
Chandler vs. Robinett, 131 Pac. 891 (Cal.).

Tested by this rule, it will be seen that at least nine-tenths of the account does not show the nature of the charge. Taking "Exhibit D" (Tr. p. 94), the first item is entered:

"By loan 1000."

The second entry is:

"To cash 649."

There is nothing whatever on the face of this account to show what was the nature or character of the transactions represented by the subsequent entries on that page. The same remarks apply to a large majority of all of the other entries on all three of the accounts. There is nothing on the face of the account itself to show whether the charges made thereon were for cash advanced on checks or for discounts or bills of ex-

change or promissory notes, or for some other character of obligation incurred by Frank Waterhouse, Limited, to the bank.

There is always a degree of discretion vested in the trial Court to determine in the first instance whether the showing made is sufficient to dispense with the production of primary or the best evidence, so as to admit the secondary evidence in its stead, and in the matter of books of account, there is a measure of discretion resting with the trial Court to determine in the first instance whether the testimony offered to establish the trustworthiness of the book entries is sufficient to warrant the introduction of the books, and in such matters, his decision will not be overruled unless clearly erroneous.

Carlton vs. Corry, 81 N. W. 85.
Riley vs. Bochm, 167 Mass. 183.
Webster vs. San Pedro L. Co., 101 Cal. 326.

There can be no question that the production of the checks themselves, either on the trial of the case or before the Commissioner, so that copies could be used on the trial, would have been a more satisficatory method of proving that the items charged against the English Company by the bank were in fact advanced on checks of that company, particularly where it was necessary to show that the moneys were advanced upon checks signed by two of the directors and the secretary

of the company. In fact, it has been held in such case that the production of the checks is absolutely necessary and original entries by the teller in the books of the bank are not admissible without the checks.

Montgomery vs. Planett, 37 Ala. 222.

It is not necessary in this case to go to that length, but the failure to produce the checks, when it is shown that they are in existence and easily accessible and could have been produced, is a circumstance which can properly be considered by the court in determining whether under all the circumstances the best evidence available is being presented. The failure to produce the bank's books of original entry, or in fact, any of the bank's books, either at the trial or before the Commissioner, is another circumstance which could properly be considered by the Court in the same connection. Failure to produce as a witness any officer of the bank having personal knowledge of the advances made by the bank to Frank Waterhouse, Limited, is another circumstance tending to discredit the accounts. A failure to produce any of the officers or employees of the bank who made the entries in the books, or tender any witness with personal knowledge who could testify that the entries were correctly made, and by persons having knowledge of the transactions at the time, is such a serious defect in the proof that it would have been error upon the part of the Court below to have admitted the account in evidence.

We think the ruling of the Court sustaining the objections to the accounts was not only warranted, but a failure to have so ruled would have been reversible error.

V.

HEARSAY EVIDENCE.

Plaintiff in error, while apparently conceding that the testimony excluded by the Court upon objections made during the trial was either hearsay evidence or otherwise not the best evidence and therefore ordinarily not admissible, contends that by the stipulation under which the depositions of these witnesses were taken, the defendant's attorneys had agreed to waive objections to hearsay testimony. This stipulation (Record p. 52) was given by the defendant as a courtesy to plaintiff's attorneys and was intended as a waiver of technical formalities only; but it was not intended as a waiver of objections to improper or illegal testimony. It seems obvious that the defendant would not knowingly have stipulated that the plaintiff could take a roving commission to take testimony upon stated interrogatories and cross interrogatories and consent in advance that hearsay and matters of which the witnesses had no personal knowledge should be admitted as evidence, or that defendant intended to waive his right to demand the production of the best evidence

of which the nature of the subject was susceptible. The stipulation expressly reserves the right upon the trial of the case to object to the *materiality* or *relevancy* of any of the testimony. This stipulation should be given a fair construction with a view to carrying out the intention in the minds of the parties at the time it was executed. So construed, it manifestly does not preclude the defendant from objecting to hearsay testimony.

Materiality has been defined: "The property of substantial importance or influence, especially as distinguished from formal requirement. Capability of properly influencing the result of the trial."

Bouvier, Vol. 2, p. 115.

In Greenleaf on Evidence, Vol. 1, Sec. 50 (13th ed.), the general rules as to relevancy are stated as follows:

> "*General rules as to relevancy.* The production of evidence to the jury is governed by certain principles which may be treated under four general heads or rules. The first of these is that the evidence must correspond with the allegations and be confined to the point in issue. The second is that it is sufficient if the substance only of the issue be proved. The third is that the burden of proving a proposition, or issue, lies on the party holding the affirmative. And the fourth is that the best evidence of which the case, in its nature, is susceptible must always be produced."

Manifestly, hearsay evidence is inadmissible under

the fourth rule above laid down as to relevancy. Hearsay is not the best evidence of any fact in issue.

In *Jones' Commentaries on Evidence,* Vol. 1, Sec. 135, in discussing the general subject of relevancy, the author says:

> "The subjects of admissions, opinion evidence, *res gestae, hearsay,* book entries, and even other subjects, might logically enough be grouped under the general title of relevancy."

These authorities clearly show that hearsay evidence may be excluded as irrelevant as well as immaterial. Strictly, the only fact proven by a hearsay statement is that such statement was made to the witness. If that fact was at issue, then the testimony would be material and relevant to prove that such statement had been made to the witness; but where the issue is not what statement had been made to the witness but what were the real facts as to the transactions about which the statement was made, it is manifest that it is immaterial whether the statement had been made to the witness or not.

The only testimony referred to by defendant in error as tending to show that the payment made by Gill to the bank in February, 1907, was not intended as a payment but as a purchase, and to establish contemporary agreement to transfer the debt of the bank against Frank Waterhouse, Limited, to Gill, was the

statement of Anderson, on page 32 of the Record, and the statement of McEwen, on page 36 of the Record, and the statement of Gill on page 26 of the Record. With respect to the statement of Gill, it is sufficient to say that he stated that he had no personal knowledge of the initiation of the transaction between John Gill and the bank, and then proceeds to state some understanding which he had acquired from some source which he does not disclose. He does not claim to have any personal knowledge of the transaction whatever.

By cross-interrogatory Number 3 (Record, p. 62) the witness Anderson was asked the following question:

> "If you have stated in answer to direct interrogatory Number 10 that the letter of guarantee of Frank Waterhouse, Limited, was assigned to plaintiff, John Gill, please state at whose instance and request such assignment was made? Who first made the suggestion to the bank that said letter of guarantee should be so assigned or transferred? Was Alexander McNab a party to such negotiations or present in person or by representative at any time in connection therewith?"

The answer to this cross-interrogatory, if any was ever given, is not shown in the record.

In answer to cross-interrogatory Number 4, he does state that the payment was made to the bank by Gill in exchange for the assignation in his favor, but in the same connection he states that he understood the payment was made by check but that he has not the particulars.

By cross-interrogatory Number 5 he was specifically asked this question:

> "Did you personally participate in the negotiations leading up to the execution of this assignment to the plaintiff John Gill (Record, p. 62)?"

His answer (Record, p. 32) is:

> "As already stated, I did not participate in the negotiations leading up to the execution of the assignation to the said John Gill."

It is clear, therefore, that this witness has no personal knowledge of the transaction between Gill and the bank further than the fact possibly that the bank did receive the money from Gill. The money, however, was paid in February, 1907, and the assignment was not made until October, 1907.

The testimony of McEwen, which was excluded by the Court, is found on page 35 of the Record. He stated that he had examined a copy of the accounts of the English Company with the bank and that he was satisfied they correctly set forth the amount advanced. He further stated, in answer to cross- interrogatory, that he was not connected with the English Company until after the greater part of the advances had been made, and therefore he could have had no personal knowledge of the transactions at the time the advances were made. The statement is merely an expression of opinion as to the correctness of the accounts

Another statement of witness McEwen, referred to by plaintiff in error, is that found on page 26 of the Record. He stated that some time subsequent to his appointment as liquidator of the English Company, he wrote to the bank notifying of his appointment and asking them to send him a certified statement of their claims against the English Company, and that they informed him that the English Company's indebtedness had been settled with the bank by Mr. Gill and that they had assigned their claim to him. Evidently, this is improper testimony. Neither the witness' statement to the bank nor the bank's statement to him was in any sense proper testimony as against the defendant in error in this case, neither having been a part of the *res gestae*.

VI.

The seventh Assignment of Error is that the Court erred in admitting over the objection of the plaintiff the agreement made October 6, 1900, between the defendant in error on the one part, and Frank Waterhouse, Limited, of the other part. This is shown as Plaintiff's Exhibit "I" in the Record. As a matter of fact and as the record shows, this agreement was never admitted in evidence by the Court. It was offered in evidence by the defendant as a part of the cross-examination of the witness McEwen, but was objected

to by plaintiff and the ruling reserved by the Court. No subsequent ruling was made by the Court with respect to this exhibit (Record, p. 38),

The Court in the memorandum opinion sustaining the nonsuit, did refer to this agreement as showing the relations between the English Company and McNab, and the defendant in error, and as shedding some light upon the question whether the payment made by Gill was intended as a purchase rather than a payment. This agreement was made a part of cross-interrogatory Number 5 addressed to the witness McEwen (Record, p. 68). It thereby became incorporated into and formed a part of the interrogatories propounded to that witness, and it was essential that it be read as a part of the interrogatory in order to understand the answer of the witness. No objection was ever made by plaintiff to the interrogatory which incorporated the agreement as a part of it. It thereby became in fact a part of the record, and it was legitimate for the Court to refer to it as a part of the record.

Plaintiff in error urges that this agreement is not shown to have been performed on the part of the defendant in error, for the reason that it is not shown that the defendant in error had carried out the agreement upon his part by the payment of the American indebtedness therein referred to. The witness McEwen does testify that this agreement was entered into by the

English corporation and that the English corporation thereupon ceased to carry on any active business in America, that being one of the stipulations in the agreement. He also testified that McNab was informed of the agreement and a summary thereof submitted to him on the day of its execution. He does not recollect whether the bank was notified of this agreement or not, but does state that the bonds of the American corporation organized by the defendant pursuant to the terms of this agreement, were lodged with the bank for safe custody, and that information of the agreement was not withheld from the bank. It is apparent from this testimony that the agreement was acted upon by the defendant in error at least to the extent of organizing the corporation contemplated and the issuance of the bonds called for, and that it was acted upon by the English corporation to the extent of receiving those bonds and immediately ceasing to carry on active business operations.

We are not seeking to enforce the terms of this agreement as against the bank, and it is not referred to by the Court in that connection, but it is a circumstance showing the situation or relationship of the parties at the time of the payment of the bank's debt by Gill. In that connection we also call attention to the fact that although the English Company ceased business in October, ~~1903~~ 1900, no claim was ever made

against this defendant by the bank until October 31, 1906, when a letter was written to the defendant by the bank, making demand for payment, being Plaintiff's Exhibit "C" in the record. This communication was signed by the witness Anderson, and in his direct testimony he says:

> "A letter was written by me for the Commercial Bank of Scotland, Limited, to Frank Waterhouse relative to the accounts of Frank Waterhouse, Limited, on the 31st October, 1906, and I append a copy of said letter to my deposition as Exhibit "B" (Record, p. 31.)"

By cross-interrogatory Number 9 (Record, p. 64) Anderson was asked:

> "If, in answer to direct interrogatory Number 14, you state that a letter was written by you for the Commercial Bank of Scotland, Limited, to the defendant, Frank Waterhouse, relative to the account of Frank Waterhouse, Limited, on or about October 31, 1906, state whether or not any requests or demands were made by the bank on Frank Waterhouse, Limited, or on any of its officers or directors for payment of the indebtedness of Frank Waterhouse, Limited, between the opening of said account in the year 1898, and the writing of said letter of October 31, 1906,"

to which he answered that he did not know whether demands for payment were made upon Frank Waterhouse, Limited, and the officials of that company prior to the 31st of October, 1906. He was further asked in the same interrogatory whether at the same time he wrote to the defendant the bank made a demand upon

the other guarantors, to which he replied that he was unable to find any record of payment having been called for from any of the other guarantors. He was further asked in the same interrogatory why demand was made upon the defendant and not made upon the other guarantors, to which he stated he was unable to give any reason. He was also asked in the same connection:

> "Please state at whose instance and request the letter of October 31, 1906, was written by you,"

to which he answered:

> "The letter of 31st October, 1906, although signed by me, was not written on my instructions."

But he evades answering the specific question at whose instance and request the letter was written. He does state, however, that McNab, one of the other guarantors, was a customer of the bank at that time and was reputed to be wealthy, and that his business was that of a distiller and director of public companies.

In view of the failure of the plaintiff to produce as witnesses any of the parties who had personal knowledge of the correctness of the books of the bank, or the production of any other proper evidence to prove the indebtedness of the English Company to the bank, by any witness having personal knowledge thereof, and the failure to produce any witnesses who had personal knowledge of the transaction between the bank

and Gill, and the palpable evasion of the answers of the Secretary of the bank with respect to matters on which he did have information, it was clearly within the province of the trial Court in the exercise of his discretion to refuse to admit hearsay testimony and secondary evidence, when the whole surrounding circumstances showed that it was within the power of the plaintiff to produce direct testimony and the best evidence if it had seen proper to do so.

Respectfully submitted,

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